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# Assessment of International Criminal Evidence: The Case of the Unpredictable Génocidaire

*Paul Behrens\**

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## Abstract

Given the importance of evidentiary considerations in international criminal trials, it is somewhat surprising that the Rules of Evidence of the international criminal tribunals do not provide for detailed norms on the assessment of evidence. The need for a clearer framework is particularly apparent in cases in which judges have to deal with the complex issue of specific intent. The adjudication of genocide is the most prominent example: specific intent is acknowledged as the element that gives genocide its special character. But the Trial Chambers have struggled with its assessment – in particular in situations where the conduct of the suspected génocidaire has not been consistent. In the course of their work, the tribunals have given widely differing assessments to this phenomenon.

It is suggested that an analytical examination of cases of inconsistent behavior can help in the development of rules for the evaluation of these situations. A preliminary question has to be whether contradictory strands of evidence do in fact exist: not every piece of evidence that points to reasons other than genocidal intent does thereby exclude the co-existence of specific intent. A further question has to attach to the value that specific strands of evidence have. Certain forms of evidence on which the Trial Chambers relied – such as the existence of a plan – are subject to criticism: they may well indicate the existence of a crime other than genocide. In other situations, the

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Trial Chambers find it difficult to evaluate a particular form of evidence (e.g., the lack of positive acts).

This article accepts that the considerable variations in the findings of the Trial Chambers on inconsistent behavior are partly due to the very complex nature of genocidal intent. But it concludes that the absence of clear guidelines on the weighing of evidence must also be held accountable for the resulting differences in approach. The current situation furthers the freedom of assessment; but it achieves this objective at the expense of legal certainty.

## I. Introduction

The evaluation of evidence has traditionally occupied a significant place in the deliberations of international courts and tribunals. The importance of this task was evident even in the first case to be decided by the International Court of Justice (ICJ);<sup>1</sup> and its prominent position has been retained in subsequent case-law of the court.<sup>2</sup> Before international criminal tribunals, the significance of evidentiary deliberations is even more apparent. Acceptance or dismissal of evidence and distinctions in the weighing of strands of evidence have a direct impact on a finding on the liability of the defendant,<sup>3</sup> and the reasoning of the Trial Chambers on this matter is subject to review by the Appeals Chambers which offer further insights on the evaluation of

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<sup>1</sup> The *Corfu Channel* Case, in which the question arose whether mine-laying operations would have been observed by the lookout posts of the Albanian government. The Experts of the ICJ went so far as to conduct a visibility test on the evening of 28.1.1949, to which the Court made explicit reference: "A motor ship, 27 metres long, and with no bridge, wheel-house, or funnel, and very low on the water, was used. The ship was completely blacked out, and on a moonless night, i.e., under the most favourable conditions for avoiding discovery, it was clearly seen and heard from St. George's Monastery. The noise of the motor was heard at a distance of 1,800 metres, and the ship itself was sighted at 670 metres and remained visible up to about 1,900 metres.", *Corfu Channel* Case, ICJ Reports 1949, 21.

<sup>2</sup> For instance, in the *Elettronica Sicula* Case, the court rejected the claim of discriminatory reasons behind a requisition order because of lack of evidence, *Case Concerning Elettronica Sicula S. p. A. (ELSI)*, ICJ Reports 1989, 72 et seq., para. 122. In the *Nicaragua* Case, it considered the existing evidence insufficient for a finding of attributability of military or paramilitary acts; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Merits), ICJ Reports 1986, 112 et seq., para. 216.

<sup>3</sup> In a recent case, a defendant who was sentenced to 20 years imprisonment by the ICTR Trial Chamber for genocide and extermination as a crime against humanity was acquitted and released by the Appeals Chamber, after the latter had noted several errors in the Trial Chamber's assessment of the evidence; ICTR (Appeals Chamber), Case No. ICTR-01-73-A, *Protais Zigiranyirazo v. The Prosecutor*, Judgment 16.11.2009 (*Zigiranyirazo*, Appeals Chamber), para. 73.

evidence.<sup>4</sup> In addition, the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) all have specific Rules of Procedure and Evidence (the RPE)<sup>5</sup> by which the chambers are bound.

The need for a conclusive analysis of the evidentiary situation is particularly strong in cases where a subjective perception lies at the heart of the matter. Objective conduct carries its own difficulties: eyewitnesses may be unreliable; documentary evidence may be open to interpretation. But the mind is a closed realm; absent any (credible) statement by the person concerned, the court will find it difficult to assess the thought processes of the individual. The matter is further complicated if the evaluation of evidence involves the examination of a heightened form of the subjective element, which no longer finds a counterpart in an objective act. That is the case when international tribunals are called upon to evaluate claims which involve a determination of specific intent: an intent which goes beyond the mere mirror image of the act in question. Finding a witness, who *saw* the act happening, may not be enough to establish the specific intent of the person concerned.

The most prominent situation of this kind arguably arises if the bench has to decide on the question whether genocide has been committed – a task in which both the ICJ<sup>6</sup> and the international criminal tribunals<sup>7</sup> have been engaged in the past. The *actus reus* of genocide, as stipulated in the Genocide Convention<sup>8</sup> and subsequent instruments of international law<sup>9</sup> is com-

<sup>4</sup> For a prominent example, see ICTY (Appeals Chamber), Case No. IT-95-10-A, *The Prosecutor v. Goran Jelisić*, Judgment 5.7.2001 (*Jelisić*, Appeals Chamber), para. 71 and *Zigiranyirazo* (Appeals Chamber), para. 73.

<sup>5</sup> ICTY Rules of Procedure and Evidence of 1994, IT/32/Rev. 44, (as amended) (ICTY RPE); ICTR Rules of Procedure and Evidence of 1995, (as amended) (ICTR RPE); ICC Rules of Procedure and Evidence of 2002, ICC-ASP/1/3 (ICC RPE). For the ICJ, the “Rules of Court” (14.4.1978, as amended) apply (ICJ Rules).

<sup>6</sup> See *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (ICJ, *Genocide Application Case*), ICJ Reports 2007, 1 et seq.

<sup>7</sup> Cases involving charges of genocide arise more regularly before the ICTR than before the ICTY. However, important case law on the issue of genocide has been generated by the latter tribunal as well (see e.g. the aforementioned *Jelisić* Case (note 4); ICTY (Appeals Chamber), Case No. IT-98-33-A, *The Prosecutor v. Radislav Krstić*, Judgment 19.4.2004 (*Krstić*, Appeals Chamber) and, more recently, ICTY (Trial Chamber), Case No. IT-05-88-T, *The Prosecutor v. Vujadin Popović, Ljubisa Beara, Drago Nikolić, Ljubomir Borovcanin, Radivoje Miletić, Milan Gvero, Vinko Pandurević*, Judgment 10.6.2010 (*Popović et al.*, Trial Chamber).

<sup>8</sup> Art. II Genocide Convention.

<sup>9</sup> Art. 4 of the Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY Statute), Art. 2 of the Statute of the International Tribunal for Rwanda (ICTR Statute), Art. 6 of the Rome Statute of the International Criminal Court (ICC Statute).

parably easily fulfilled: causing “serious bodily or mental harm” to a member of a national, ethnical, racial or religious group, suffices.<sup>10</sup> The *mens rea* on the other hand requires a mindset that goes far beyond that. In this regard, the Genocide Convention specifies that the perpetrator must have had the “intent to destroy, in whole or in part” the protected group as such.<sup>11</sup> It is primarily the difficulty of proving this form of intent which led the ICJ in the *Genocide Application* Case to reject the employment of the word “genocide” for any of the atrocities of the Bosnian war except the mass killings at Srebrenica in 1995.<sup>12</sup> The international criminal tribunals have encountered similar problems relating to a positive finding of specific genocidal intent.<sup>13</sup>

The procedural rules of the international tribunals, where they exist, are only of limited help in this matter. The Rules of the Court which the ICJ adopted in 1978, are fairly laconic when it comes to the evaluation of evidence<sup>14</sup> and merely state that the “method of handling” evidence “shall be settled by the Court” (after ascertaining the views of the parties<sup>15</sup>). Important issues such as the standard of proof which needs to be met, are not specifically addressed and have therefore become subject to some debate in the literature.<sup>16</sup> *Green*, who examined several cases of “fluctuating standards” employed by the ICJ in the field of self-defense, noted that it “runs against the grain of international arbitral practice to attempt to identify evidentiary standards at all”,<sup>17</sup> and it is certainly true that the court reserves the right to

<sup>10</sup> In addition to this, the Elements of Crime (2000) stipulate for the first time a further contextual element: the conduct must have taken “place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”. The legal validity of this element, however, is subject to some controversy: see the debate in ICC Pre-Trial Chamber, paras. 125-133, and *R. Cryer*, The Definitions of International Crimes in the Al Bashir Arrest Warrant Decision, *Journal of International Criminal Justice* 7 (2009), 209.

<sup>11</sup> Art. II Genocide Convention.

<sup>12</sup> ICJ, *Genocide Application* Case, para. 370.

<sup>13</sup> ICTY (Trial Chamber), Case No. IT-95-10-T, *The Prosecutor v. Goran Jelisić*, Judgment 14.12.1999 (*Jelisić*, Trial Chamber), paras. 106, 108; against that, *Jelisić* (Appeals Chamber), para. 71. ICTY (Trial Chamber), *The Prosecutor v. Radoslav Brdjanin*, Case No. IT-99-36-T, Judgment 1.9.2004, (*Brdjanin*, Trial Chamber), paras. 979, 982, 984, 987-989.

<sup>14</sup> On this, see *J. R. Crook*, Judicial Activity of the International Court of Justice, *AJIL* 98 (2004), 311.

<sup>15</sup> ICJ Rules, Rule 58.

<sup>16</sup> *J. A. Green*, Fluctuating Standards for Self-Defence in the International Court of Justice, *ICLQ* 58 (2009), 163 et seq.; *M. E. O’Connell*, Rules of Evidence for the Use of Force in International Law’s New Era, *ASIL Proc.* 100 (2006), 44.

<sup>17</sup> *J. A. Green* (note 16), 178.

adopt varying standards of proof, depending on the nature of the case.<sup>18</sup> However, as far as the determination of responsibility under the Genocide Convention is concerned, the ICJ itself demanded a fairly high standard: it considered it necessary to call for “proof at a high level of certainty appropriate to the seriousness of the allegation”.<sup>19</sup>

In this regard, the RPE of the international criminal tribunals are more advanced: at least the required standard of proof is clear. The Court has to be satisfied that the guilt of the defendant has been proved “beyond reasonable doubt”,<sup>20</sup> a requirement which ultimately derives from the presumption of innocence.<sup>21</sup> The extensive case-law especially of the ICTY and the ICTR has furthermore offered further elaboration on questions of procedure and evidence. It is for these reasons that the law of the international criminal tribunals provides a particularly interesting opportunity for an examination of the way in which evidence in relation to specific genocidal intent is assessed.

The procedural rules of the international criminal tribunals reveal influences by both common law and civil law traditions,<sup>22</sup> and while it appears appropriate to speak of the *sui generis* character of the resulting regime,<sup>23</sup> it is difficult to deny that it has adopted elements of the “inquisitorial” as well as the “adversarial” systems.<sup>24</sup> The rules pertaining to the presentation of evidence have been viewed as more typical of the adversarial system,<sup>25</sup> the existence of a bench trial (as opposed to a trial by jury) as more indicative of the inquisitorial system;<sup>26</sup> the absence of an “investigating judge” as bearing a closer relation to the adversarial system,<sup>27</sup> and so forth.

<sup>18</sup> “The Court’s prime objective as to standard of proof appears to have been to retain a freedom in evaluating the evidence, relying on the facts and circumstances of each case”, *R. Higgins*, Speech to the 6<sup>th</sup> Committee of the General Assembly, 2.11.2007, 4, at <http://www.icj-cij.org/presscom/files/3/14123.pdf>.

<sup>19</sup> ICJ, *Genocide Application Case*, para. 210.

<sup>20</sup> Rule 87 (A) ICTY RPE; Rule 87 (A) ICTR RPE; Art. 66 of the ICC RPE.

<sup>21</sup> Human Rights Committee, General Comment No. 32, Art. 14: Right to equality before courts and tribunals and to a fair trial, U.N. Doc. CCPR/C/GC/32 (2007).

<sup>22</sup> *R. May/M. Wierda*, Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha, Colum. J. Transnat’l L. 37 (1999), 727.

<sup>23</sup> *K. Ambos*, International Criminal Procedure: “adversarial”, “inquisitorial” or mixed?, International Criminal Law Review 3 (2003), 34, with reference to *Prosecutor v. Delalić et al.*, Decision on the Motion on Presentation of Evidence by the Accused, Esad Landzo 1.5.1997 (IT-96-21-T), para. 15.

<sup>24</sup> For a critical evaluation of the use of these terms, see *K. Ambos* (note 23), 2 et seq.

<sup>25</sup> *R. May/M. Wierda* (note 22), 727.

<sup>26</sup> But see *P. L. Robinson*, Ensuring Fair and Expeditious Trials at the International Criminal Tribunal for the Former Yugoslavia, EJIL 11 (2000), 575.

<sup>27</sup> *P. L. Robinson* (note 26).

These differing traditions not only had an impact on the RPE; they also help to explain certain procedural mechanisms which were only developed through the case-law of the international criminal tribunals. While the Trial and Appeals Chambers regularly dedicate extensive sections of their judgments to evidentiary issues, it is true that some norms in this field are better developed than others. The question of admissibility is an example for the former. The rules of all three international criminal tribunals make reference to the admissibility of evidence;<sup>28</sup> in the case of the *ad hoc* tribunals they stipulate that “relevant” evidence which the Chamber deems to have “probative value” may be admitted.<sup>29</sup> In practice, however, the decision will often be in favor of admissibility,<sup>30</sup> leaving the potential dismissal of pieces of evidence to the stage of assessment. The Tribunals themselves are often engaged with the evaluation of the reliability of particular forms of evidence (documents and witness evidence).<sup>31</sup>

However, neither the admissibility nor the reliability of evidence on their own are capable of lending sufficient assistance to the evaluation of evidence, especially if the case involves the determination of specific intent, where judges often have to gauge the subjective element from more circumstantial factual evidence. It is entirely possible that the available evidence is admissible, reliable and relevant, but does not yield sufficient clarity about the mindset of the perpetrator.

For instance, a defendant charged with genocide may indeed have caused the death of members of the protected group, but may have assisted others or let them escape.<sup>32</sup> A suspected génocidaire may have targeted a substan-

<sup>28</sup> Rule 89 (C) ICTY RPE; Rule 89 (C) ICTR RPE; Rule 63 ICC RPE.

<sup>29</sup> Rule 89 (C) ICTY RPE; Rule 89 (C) ICTR RPE. Rule 63 of the ICC states that the Chamber has the authority to “assess freely all evidence” to determine “its relevance or admissibility”. On this principle of “free assessment of evidence”, see at note 35.

<sup>30</sup> *R. Cryer/H. Friman/D. Robinson/E. Wilmsburst*, An Introduction to International Criminal Law and Procedure, 2010, 466, and see *Prosecutor v. Milan Martić*, Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Decision of 19.1.2006, Case No. IT-95-11-T, Annex A, Guidelines on the Standards Governing the Admission of Evidence, para. 2. (with reference to documentary evidence).

<sup>31</sup> See e.g., ICTY (Trial Chamber), Case No. IT-00-39-T, *Prosecutor v. Momčilo Krajišnik*, Judgment 27.9.2006, (*Krajišnik*, Trial Chamber) paras. 901, 902; ICTR (Trial Chamber), Case No. ICTR-96-4-T, *The Prosecutor v. Jean-Paul Akayesu*, Judgment 2.9.1998 (*Akayesu*, Trial Chamber), para. 131.

<sup>32</sup> See for instance *Jelić* (Trial Chamber), para. 106; ICTR (Appeals Chamber), Case No. ICTR-95-1-A, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment 1.6.2001, (*Kayishema*, Appeals Chamber), para. 147; ICTR (Trial Chamber), Case No. ICTR-95-1-T, *The Prosecutor v. Clément Kayishema and Obed Ruzindana*, Judgment 21.5.1999 (*Kayishema*, Trial Chamber), para. 310; ICTR (Trial Chamber), Case No. ICTR-01-74-T, *The Prosecutor v. François Karera*, Judgment 7.12.2007 (*Karera*, Trial Chamber), para. 582.



tial part of a protected group, but may claim to have acted for reasons other than the intended destruction of the group as such.<sup>33</sup> In these cases, several strands of evidence exist which are all relevant to the question of the subjective element, but which, if they are accepted as equally reliable, constitute an apparent contradiction.

The challenge for the judges then relates not so much to admissibility or credibility, but to the weighing of the available evidence.<sup>34</sup> That task, however, falls into those areas of procedural law where the rules of the tribunals do not show an advanced degree of development. This is quite deliberate: the guiding principle on the weighing of evidence is the freedom of assessment. It is a principle which the international criminal tribunals have confirmed on several occasions,<sup>35</sup> and whose existence reveals a certain influence of the inquisitorial system: freedom of assessment forms a traditional element of the domestic procedural law of civil law countries.<sup>36</sup> The rationale for this freedom is best understood through an appreciation of the difference between international criminal procedure and common law systems: the procedure before international criminal tribunals envisages a bench trial;

<sup>33</sup> See for instance *Kayishema* (Appeals Chamber), para. 161.

<sup>34</sup> See also *P. M. Hassan-Morlat*, Evidence in International Criminal Tribunals: Lessons and Contributions from the Special Court for Sierra Leone, *African Journal of Legal Studies* 3 (2009), 104. That the decision-making process in these situations involves a weighing of evidence was confirmed by the Appeals Chamber in the case of *Goran Jelisić*, when it did not dismiss the instances in which the defendant “showed mercy” as lacking credibility, but noted that “a reasonable trier of fact could have discounted” them as “aberrations”, *Jelisić* (Appeals Chamber), para. 71. See also the criticism made in ICTR (Trial Chamber), Case No. ICTR-01-72-T, *The Prosecutor v. Simon Bikindi*, Judgment 2.12.2008 (*Bikindi*, Trial Chamber), para. 248.

<sup>35</sup> See ICTY, *Prosecutor v. Milan Martić* (Trial Chamber), Decision Adopting Guidelines on the Standards Governing the Admission of Evidence, Case No. IT-95-11-T, Decision of 19.1.2006, Annex A, para. 2; ICTR (Trial Chamber), Case No. ICTR-96-13-A, *The Prosecutor v. Alfred Musema*, Judgment 27.1.2000 (*Musema*, Trial Chamber), para. 75; ICTY, *Prosecutor v. Milomir Stakić* (Trial Chamber), Provisional Order on the Standards Governing the Admission of Evidence and Identification, Case No. IT-97-24-PT, Decision of 25.2.2002, Annex, para. 1; *Prosecutor v. Enver Hadzihasanovic, Amir Kubura* (Trial Chamber), Decision on the Admissibility of Documents of the Defence for Enver Hadzihasanovic, Decision of 22.6.2005, Case No IT-01-47-T, para. 15. “Freedom of assessment” is a general principle that also refers to decisions on admissibility and relevance; in this context, the Rules of the ICC make express reference to it in Rule 63 (2). The ICTY and ICTR Rules merely require a Chamber to “apply rules of evidence which will best favour a fair determination of the matter before it” (Rule 89 [B] ICTY RPE, Rule 89 [B] ICTR RPE).

<sup>36</sup> ICTY (Trial Chamber), *The Prosecutor v. Dusko Tadić*, Case No. IT-94-1-T, Judgment, 4.5.1997, (*Tadić*, Trial Chamber), para. 537; ICTY (Appeals Chamber), Case No. IT-95-16-A, *Prosecutor v. Zoran Kupreškić, Mirjan Kupreškić, Vlatko Kupreškić, Drago Josipović, Vladimir Šantić*, Judgment 23.10.2001 (*Kupreškić et al.*, Appeals Chamber), para. 38. For a reference to the German and French systems, see *P. L. Robinson* (note 26), 577.



and the argument can therefore be made that there is “no need to protect jurors from lay prejudice”.<sup>37</sup> As professional judges, members of the Trial Chambers are considered to bring a sufficient amount of experience to their job when it comes to the weighing of evidence.<sup>38</sup>

But the result of this is that there are no hard and fast rules to which the tribunals have to adhere when they engage in this task. From time to time, the Trial Chambers themselves have offered suggestions when it came to the evaluation of certain forms of evidence. Evidence which was corroborated by other evidence was seen as having greater value than evidence standing alone;<sup>39</sup> there needs to be a sufficient link between the time to which the evidence refers and the relevant period under the terms of the indictment;<sup>40</sup> circumstantial evidence can be used, but if an inference is to be drawn from it, it must be the only reasonable conclusion available.<sup>41</sup> While the reasoning behind these views may be attractive, it is not always clear if they have developed into normative rules of evidence in the procedural law of the international criminal tribunals.

Not everybody considers this freedom of assessment a disadvantage. *Cryer et al.* point out that “complex factual situations, large amount of evidence, and difficulties in obtaining it, are all reasons for flexibility”<sup>42</sup> while admitting that this “also raises issues of fairness and efficiency of the proceedings”. The very complexity does indeed support arguments to the contrary: given the qualitatively and quantitatively challenging nature of the issues before them, the efficiency of the proceedings may benefit from the adoption of clear guidelines which judges can follow in all situations in which they apply.

In fact, there are few limitations which are placed on the discretion of the Trial Chamber judges: the rules of ICTY and ICTR merely stipulate that the adopted rules of evidence have to be “consonant with the spirit of the Statute and the general principles of law”.<sup>43</sup> Some restrictions can be identified from the jurisprudence of the Appeals Chambers, but they are quite general in nature: chief among them the fact that the Trial Chamber has to

<sup>37</sup> *R. Cryer/H. Friman/D. Robinson/E. Wilmshurst* (note 30), 465.

<sup>38</sup> *K. Ambos* (note 23), 30 and see *P. M. Hassan-Morlai* (note 34), 112.

<sup>39</sup> *Musema* (Trial Chamber), para. 75.

<sup>40</sup> *Kayishema* (Appeals Chamber), para. 130.

<sup>41</sup> ICTY (Trial Chamber), Case No. IT-02-60-T, *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment 17.1.2005 (*Blagojević* (Trial Chamber), para. 21.

<sup>42</sup> *R. Cryer/H. Friman/D. Robinson/E. Wilmshurst* (note 30), 465.

<sup>43</sup> Rule 89 (B) ICTY RPE; Rule 89 (B) ICTR RPE.

engage in *some* form of evaluation in the first place<sup>44</sup> and is apparently not allowed to delegate this task to experts.<sup>45</sup> The evaluation must not be unreasonable or “wholly erroneous”,<sup>46</sup> but the Appeals Chambers accept that two judges, “both acting reasonably” can reach different conclusions on the available evidence.<sup>47</sup> The standard of proof, which has been mentioned above, acts as a further limitation on the freedom of assessment: a finding of guilty may only be entered if the prosecution has proved guilt beyond reasonable doubt.<sup>48</sup>

The enforcement of these limitations, however, carries its own difficulties. The Appeals Chambers of the *ad hoc* tribunals certainly have the authority to reconsider the decisions of the Trial Chambers, and they do so if they perceive errors of law which invalidate the decision<sup>49</sup> or errors of fact which result in a “grossly unfair outcome in judicial proceedings”.<sup>50</sup> The ICC Statute envisages appeals in cases of procedural errors as well as errors of fact or of law.<sup>51</sup> The convicted person and the Prosecutor on his behalf may also make an appeal on any other ground affecting “the fairness or reliability of the proceedings or decision”.<sup>52</sup> As a general rule, however, the Appeals Chambers are reluctant to repeat the process of ascertaining the available evidence. The view expressed by the *Aleksovski* Appeals Chamber is generally followed: “Trial Chambers are best placed to hear, assess and weigh the evidence, including witness testimonies, presented at trial.”<sup>53</sup> In this context, Appeals Chambers frequently refer to a “margin of deference” which has to be given to the Trial Chambers’ assessment of evidence pre-

<sup>44</sup> In the *Krajišnik* Case, the ICTY Appeals Chamber held that the Trial Chamber did not have to refer to every piece of evidence “as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence”, ICTY (Appeals Chamber), Case No. IT-00-39-A, *Prosecutor v. Momčilo Krajišnik*, Judgment 17.3.2009 (*Krajišnik*, Appeals Chamber), para. 379.

<sup>45</sup> Contempt Proceedings against *Dragan Jokić*, Appeals Chamber (ICTY), Judgment on Allegations of Contempt, 25.6.2009, para. 18 and *K. Margetts/P. Hayden*, Current Developments at the Ad Hoc International Criminal Tribunals, *Journal of International Criminal Justice* 8 (2010), 672.

<sup>46</sup> ICTY (Appeals Chamber), Case No. IT-95-14/1-A, *Prosecutor v. Zlatko Aleksovski*, Judgment 24.3.2000 (*Aleksovski*, Appeals Chamber), para. 63.

<sup>47</sup> ICTY (Appeals Chamber), Case No. IT-94-1-A, *Prosecutor v. Dusko Tadić*, Judgment 15.7.1999, (*Tadić*, Appeals Chamber), para. 64.

<sup>48</sup> See note 20 and *P. M. Hassan-Morlai* (note 34), 102.

<sup>49</sup> *R. Cryer/H. Friman/D. Robinson/E. Wilmshurst* (note 30), 472.

<sup>50</sup> *Kupreškić et al.* (Appeals Chamber), para. 29.

<sup>51</sup> Art. 81 (1) (a) ICC Statute.

<sup>52</sup> Art. 81 (1) (b) ICC Statute.

<sup>53</sup> *Aleksovski* (Appeals Chamber), para. 63.

sented at trial.<sup>54</sup> In the *Jelišić* Case, the Appeals Chamber did show itself interventionist and reproached the Trial Chamber for the way in which it had performed its task of weighing the evidence.<sup>55</sup> But this led to a split among the judges, with Judge *Pocar* writing in his partially dissenting opinion that he felt the Appeals Chamber should not have “disturb[ed] the factual findings made by the Trial Chamber”<sup>56</sup> and referring back to the established margin of deference due to the Trial Chamber’s evaluation of evidence.<sup>57</sup>

The result of these developments is that the Trial Chambers of the international criminal tribunals are relatively unhindered in their methods of weighing the available evidence. This is a flexibility which may be perceived as advantageous, as Trial Chambers have to deal with a plethora of different situations which may require the employment of adaptable approaches. But this flexibility also creates the possibility that two different Trial Chambers, faced with comparable situations, come to different results in their weighing of evidence, which may both be perfectly valid. The consequence of this is an uncertainty which places considerable obstacles in the preparation of the cases of both prosecution and defense, since neither of them can ever be sure by what standards their evidence will be judged. For legal practitioners, the prevailing uncertainty hampers the development of an adequate trial strategy; for the defendant, it may spell the difference between an acquittal and a long prison term or even a life sentence.

This article will deal with one area in particular in which uncoordinated methods of weighing evidence have played a significant role in international criminal procedure: the assessment of genocidal intent; specifically in those cases in which contradictory pieces of evidence exist. In these situations, the admissibility of evidence is not in question, and the differing strands may even carry comparable credibility. But as they point in different directions, the determination of their incriminatory value is left largely to the discretion of the judges of the Trial Chamber. This article suggests that the resulting differences in outcome are unsatisfactory, and it seeks to advance options which would lead to better solutions of the prevailing difficulties.

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<sup>54</sup> ICTR (Appeals Chamber), Case No. ICTR-96-4, *The Prosecutor v. Jean-Paul Akayesu*, Judgment, 1.6.2001 (*Akayesu*, Appeals Chamber), para. 132; *Tadić* (Appeals Chamber), para. 64; *Kupreškić et al.* (Appeals Chamber), para. 30; *Aleksovski* (Appeals Chamber), para. 63.

<sup>55</sup> *Jelišić* (Appeals Chamber), para. 71, see note 34 above.

<sup>56</sup> *Jelišić* (Appeals Chamber), Partial Dissenting Opinion of Judge *Pocar*, para. 7.

<sup>57</sup> *Jelišić* (note 56), fn. 3.

## II. Inconsistent Behavior in Genocide Cases: The View of the International Criminal Tribunals

It is the particular importance which genocidal intent exercises in relation to the entire concept of the crime, that turns it into a principal illustration for the results which the lack of uniformity in the assessment methods of the international criminal tribunals engenders. On the one hand, the intent of the génocidaire – the intent “to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”<sup>58</sup> – is one of the most significant elements of genocide; one which the International Law Commission emphasized as the crime’s “distinguishing characteristic”.<sup>59</sup> On the other hand, intent is notoriously difficult to prove, and the acceptance of suitable elements of evidence has therefore become of crucial importance to the adjudication of the crime.<sup>60</sup>

Not all situations pose the same problems. In the past, the international criminal tribunals have dealt with cases in which statements were made which left little doubt as to the intent of their authors (especially when followed by unambiguous actions against the victim group). A prime example is the phrase *tubatsembatsembe* (“let’s exterminate them”) which was used during the massacres in Rwanda in 1994.<sup>61</sup> But in many instances, such clear

<sup>58</sup> Art. II Genocide Convention; Art. 4 (2) ICTY Statute; Art. 2 (2) ICTR Statute; Art. 6 ICC Statute.

<sup>59</sup> Yearbook of the International Law Commission 1996, vol. 2, part 2, part 44, Art. 17 (“Crime of Genocide”), para. 5.

<sup>60</sup> See *M. Lippman*, Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium, *Hous. J. Int’l L.* 23 (2000-2001), 506. The ad hoc tribunals have looked to a variety of strands of evidence to establish genocidal intent. For a summary, see *D. L. Nersessian*, The Razor’s Edge: Defining and Protecting Human Groups Under the Genocide Convention, *Cornell Int’l L. J.* 36 (2003), 314 and *L. Martinez*, Prosecuting Terrorists at the International Criminal Court: Possibilities and Problems, *Rutgers L. J.* 34 (2002-2003), 24 as well as the extensive discussion in *D. Alonzo-Maizlish*, In Whole or in Part: Group Rights, the Intent Element of Genocide, and the “Quantitative Criterion”, *N. Y. U. L. Rev.* 77 (2002), 1386 et seq.; and *C. Fournet*, International Crimes: Theories, Practice and Evolution, 2006, 90.

<sup>61</sup> See in particular ICTR (Trial Chamber), Cases No. ICTR-96-10 and ICTR-96-17-T, *The Prosecutor v. Elizaphan and Gérard Ntakirutimana*, Judgment 21.2.2003 (*Ntakirutimana*, Trial Chamber), para. 359 and ICTR (Trial Chamber), Case No. ICTR-99-52-T, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*, Judgment 3.12.2003 (*Nahimana et al.*, Trial Chamber), paras. 964 and 967. The defendant *Barayagwiza* did appeal the finding of the Trial Chamber, principally on the grounds that he had used different words. The Appeals Chamber dismissed this ground of his appeal. ICTR (Appeals Chamber), Case No. ICTR-99-52-A, *Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze v. The Prosecutor*, Judgment, 28.11.2007 (*Nahimana et al.*, Appeals Chamber), paras. 529, 539.

utterances are missing, and the Trial Chambers have to deduce the mindset of the perpetrator from other circumstances; in particular, the perpetrator's general conduct at the time. It is in this context that one of the greatest challenges for the assessment and weighing of evidence arises: the difficulty raised by a perpetrator whose conduct allows for a variety of interpretations, because it lacks consistency. The fact, for instance, that the accused has helped members of the targeted group, demonstrates, in the eyes of the defense, that he could not have acted with the required intent. To the prosecution, selective assistance to group members will usually not detract from the general finding that the defendant had the intent to destroy the group as such.

In other cases, a reference to inconsistent behavior has been employed to make a case for factors which should be considered in mitigation; the "holes in the pattern" are therefore employed for their potential impact on the level of sentencing rather than on the assessment of the substantive criminal law.

The conclusions of the Trial Chambers and Appeals Chambers reflect the respective variations. From their judgments, three main strands can be distinguished: There are cases in which the question is considered whether inconsistent behavior could count as exculpatory evidence. Secondly, there are cases in which inconsistent behavior is considered as a potentially mitigating factor. The third category is formed by cases in which the Chamber did not accord any weight to inconsistent behavior – usually, because it had doubts about the evidence which the defense presented.

The Case of *Jelisić* is the most prominent example for the first category of cases. *Jelisić*, a former farm mechanic, had become a guard at the Luka prison camp in Northern Bosnia.<sup>62</sup> His indictment encompassed 44 counts, of which 43 dealt with crimes against humanity and violation of the laws and customs of war.<sup>63</sup> The first count was a charge of genocide, for the systematic killing of Bosnian Muslims, *inter alia* at the Luka Camp. The evidence against him seemed overwhelming. *Jelisić*, a man who called himself the "Serbian Adolf" (and presented himself as "Adolf" at his initial hearing), had made in his time at the camp statements which appeared to cast little

<sup>62</sup> The Seattle Times, 14.12.1999, Bosnian Serb Gets 40 Years for War Crimes, and *Jelisić* (Trial Chamber), para. 123. On *Jelisić*'s background, M. A. Drumbl/K. S. Gallant, Appeals in the Ad Hoc International Criminal Tribunals: Structure, Procedure and Recent Cases, The Journal of Appellate Practice and Process 3 (2001), 638 and K. D. Askin, Judgments Rendered in 1999 by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda, ILSA J. Int'l & Comp. L. 6 (1999-2000), 499.

<sup>63</sup> ICTY (Trial Chamber), Case No. IT-95-10-I, *The Prosecutor v. Goran Jelisić*, Amended Indictment, 19.10.1998 (*Jelisić*, Indictment).

doubt on his intentions: he “hated Muslim women [...] wanted to sterilise them all in order to prevent an increase in the number of Muslims but [...] before exterminating them he would begin with the men in order to prevent any proliferation”.<sup>64</sup> He kept a tally of the Muslims he had killed.<sup>65</sup> He claimed he had to execute “twenty to thirty persons before being able to drink his coffee each morning”.<sup>66</sup>

But *Jelisić* also gave – “against all logic”, as the Tribunal observed – *laissez-passers* to some detainees, including one Muslim who was first forced to play Russian roulette with him, and another detainee who had first been beaten by *Jelisić*.<sup>67</sup>

What makes the *Jelisić* Case unusual is that the Trial Chamber accorded considerable weight to the existence of contradictory evidence. Having referred to the fact that *Jelisić* had let some detainees go free, it stated that *Jelisić* had killed arbitrarily rather “than with the clear intention to destroy a group”; and in view of this uncertainty, the Chamber found that

“The benefit of the doubt must always go to the accused and, consequently, Goran Jelisić must be found not guilty on this count.”<sup>68</sup>

There is a marked difference between this finding and the conclusions reached by the Appeals Chamber in the Case of *Kayishema and Ruzindana*. *Clément Kayishema* had been prefect of the Kibuye province at the time of the atrocities in Rwanda<sup>69</sup> – by training, he was a medical doctor.<sup>70</sup> The evidence against *Kayishema* was again formed in part by incriminating utterances. The defendant had referred to Tutsis as “Tutsi dogs” and “Tutsi sons of bitches” and had exhorted attackers to “get down to work” – which in this particular context was understood to mean to begin to kill Tutsis.<sup>71</sup>

But in this case, too, the defense referred to holes in the pattern. At the Appeals stage, the defense maintained that the Trial Chamber had not properly taken into account that *Kayishema* had also rescued “72 Tutsi children,

<sup>64</sup> *Jelisić* (Trial Chamber), para. 102.

<sup>65</sup> *Jelisić* (Trial Chamber), para. 103.

<sup>66</sup> *Jelisić* (Trial Chamber), para. 103.

<sup>67</sup> *Jelisić* (Trial Chamber), para. 106.

<sup>68</sup> *Jelisić* (Trial Chamber), para. 108. See also K. Kittichaisaree, The NATO Military Action and the Potential Impact Of the International Criminal Court, Sing. J. Int'l & Comp. L. 4 (2000), 513. The Appeals Chamber expressed a very critical opinion on this finding (see note 34 above).

<sup>69</sup> Africa News/Inter News (Tanzania), Rwanda; Profile of a Genocide Convict, 21.5.1999.

<sup>70</sup> *Kayishema* (Trial Chamber), para. 7.

<sup>71</sup> *Kayishema* (Trial Chamber), para. 539.

who had survived the massacre at Home St. Jean Complex”<sup>72</sup> and who were brought to Kibuye hospital (where *Kayishema* used to work).<sup>73</sup> The defense was not successful on this ground; although it appears that the Appeals Chamber also indicated some doubt as to the veracity of the claims:

“The Appeals Chamber observes that in light of the overall evidence, the fact that the 72 children *may* have been taken to the hospital pursuant to *Kayishema*’s instructions has little direct bearing on the question whether he possessed the requisite *mens rea*.”<sup>74</sup>

On other occasions, international criminal tribunals did consider instances of selective assistance as a relevant mitigating factor, but did not discuss it in their evaluation of genocidal intent. The Case of *Georges Ruggiu*, a Belgian journalist (the only European to be tried by the ICTR) falls in that category. *Ruggiu* stood accused of incitement to genocide in connection with his broadcasts for the *Radio Télévision Libre des Mille Collines* (RTLM).<sup>75</sup> On 15.5.2000, *Ruggiu* pleaded guilty to the counts of the indictment, having signed a plea agreement with the prosecution.<sup>76</sup> *Ruggiu* admitted that there was a link between his broadcasts and the deaths of victims in Rwanda.<sup>77</sup> A phrase similar to that used by *Kayishema* made its appearance here – the words “go to work”, which had been used in the broadcasts. The Trial Chamber found that with “the passage of time, the expression came to mean ‘go kill the Tutsis and Hutu political opponents of the interim government’”.<sup>78</sup>

*Ruggiu* had, however, also “personally assumed responsibility” for the hiding and transport of Tutsi children in his jeep to a mission, to keep them protected. It was alleged that the feeding of a group of farmers and refugees in Kigali, including Tutsis, was also carried out under his responsibility – and these points were not disputed by the prosecution.<sup>79</sup> On this occasion, the ICTR Trial Chamber accepted selective assistance as a mitigating factor.

The *Karera* Case on the other hand is an example for the third category of cases, in which the tribunal simply did not consider the presented evidence credible. At the time of the massacres in Rwanda, *François Karera*

<sup>72</sup> *Kayishema* (Appeals Chamber), para. 147.

<sup>73</sup> See on this *Kayishema* (Trial Chamber), para. 310.

<sup>74</sup> *Kayishema* (Appeals Chamber), para. 149. Emphasis by the Appeals Chamber.

<sup>75</sup> ICTR (Trial Chamber), Case No. ICTR-97-32-I, *The Prosecutor v. Georges Ruggiu*, Judgment 1.6.2000, (*Ruggiu*, Trial Chamber), para. 44.

<sup>76</sup> *Ruggiu* (Trial Chamber), para. 10.

<sup>77</sup> *Ruggiu* (Trial Chamber), para. 45.

<sup>78</sup> *Ruggiu* (Trial Chamber), para. 44.

<sup>79</sup> *Ruggiu* (Trial Chamber), paras. 73 and 74.



was prefect of the Kigali-Rural prefecture.<sup>80</sup> Before the ICTR, *Karera* stood accused of genocide (alternatively, complicity in genocide) according to Articles 2 (3) (a) / 2 (3) (e) ICTR Statute.<sup>81</sup> In support of the charge, the prosecution referred *inter alia* to a public order, issued by *Karera* in April 1994 to police, militia and local residents, to kill every Tutsi.<sup>82</sup> But the indictment itself pointed out that *Karera* had “selectively spared” certain Tutsis and their homes.<sup>83</sup> The defense claimed that *Karera* had saved Tutsi civilians;<sup>84</sup> and where the prosecution referred to meetings in which *Karera* incited members of the Hutu civilian population to target Tutsi civilians,<sup>85</sup> the defense spoke of “pacification meetings” in which *Karera* urged the population to stop looting and killing and called on them to “understand each other and live harmoniously”.<sup>86</sup> In May 1994, he allegedly declared that his mission was to pacify Kigali, and condemned the massacres.<sup>87</sup>

In this case, the Trial Chamber was not prepared to accept the evidence relating to the alleged saving of Tutsis – it declared it not credible.<sup>88</sup> It was somewhat less dismissive about the pacification meetings, although it found it “surprising that meetings chaired by military and civil defense leaders were aimed at contributing to reconciliation and pacification”<sup>89</sup> and it concluded that it was at any rate established that *Karera* had at certain meetings made statements “which explicitly or by implication encouraged looting or killing of Tutsis”.<sup>90</sup> The Chamber found that *Karera* had possessed the relevant genocidal intent<sup>91</sup> and decided further that there were no “significant mitigating circumstances” in this case.<sup>92</sup>

<sup>80</sup> *Karera* (Trial Chamber), para. 1.

<sup>81</sup> ICTR (Trial Chamber), Case No. ICTR-01-74-I, *The Prosecutor v. François Karera*, Amended Indictment, 19.12.2005 (*Karera*, Indictment), III. (Counts 1 and 2).

<sup>82</sup> *Karera* (Indictment), III., para. 8.

<sup>83</sup> *Karera* (Indictment), III., para. 7.

<sup>84</sup> *Karera* (Trial Chamber), para. 582.

<sup>85</sup> *Karera* (Trial Chamber), para. 378.

<sup>86</sup> *Karera* (Trial Chamber), paras. 393, 396, 397.

<sup>87</sup> *Karera* (Trial Chamber), para. 399.

<sup>88</sup> *Karera* (Trial Chamber), para. 582.

<sup>89</sup> *Karera* (Trial Chamber), para. 416.

<sup>90</sup> *Karera* (Trial Chamber), para. 417.

<sup>91</sup> *Karera* (Trial Chamber), paras. 538, 539.

<sup>92</sup> *Karera* (Trial Chamber), para. 582. *Karera* was sentenced to life imprisonment; *Karera* (Trial Chamber), paras. 569, 585. On 2.2.2009, the Appeals Chamber found that the Trial Chamber had committed no errors as far as the evaluation of the pacification meetings and the alleged saving of Tutsis was concerned and upheld the sentence of life imprisonment. ICTR (Appeals Chamber), Case No. ICTR-01-74-A *The Prosecutor v. François Karera*, Judgment 2.2.2009 (*Karera*, Appeals Chamber), paras. 286, 387-390 and 398. (The Appeals Chamber did allow other grounds for appeal).

It therefore appears that the *ad hoc* tribunals have adopted widely differing approaches when they were faced with the task of evaluating contradictory evidence in the context of genocidal intent. This is partly based on the way in which the defense invited the court to consider these holes in the pattern of the defendant's conduct (as exculpatory evidence or as a mitigating factor). But the differences in the way in which the Trial Chambers dealt with contradictory evidence – in particular in view of their role in the assessment of specific intent – create a situation which allows for little legal certainty and provides inadequate guidance for future cases of this kind.

In these circumstances, there is room for the thought that an analytical examination of these situations and the respective significance of seemingly contradictory strands of evidence might assist in the development of a method of assessment which takes into account the concerns voiced by judges and scholars dealing with this issue. A necessary preliminary to this, however, is the question whether a situation of contradictory evidence really does exist in all cases in which its existence has been alleged.

### III. Towards an Understanding of Contradictory Evidence

#### 1. Does Contradictory Evidence Exist?

Not every situation in which *prima facie* evidence of genocidal intent is joined by other pieces of evidence, leads by necessity to a contradictory outcome. There are cases where an *actus reus* of genocide was based on a variety of reasons – a range of underlying motives which do not necessarily eliminate the determinative specific intent to destroy a group in whole or in part.

The very consideration of motives was met with criticism in the jurisprudence of the tribunals. The *Kayishema* Appeals Chamber for instance noted that criminal intent “must not be confused with motive” – without, however, examining where, in the case of genocide, the dividing line is to be drawn.<sup>93</sup> The problem with this view lies in the fact that by accepting a *do-*

<sup>93</sup> *Kayishema* (Appeals Chamber), para. 161. See also *Jelisić* (Appeals Chamber), para. 49. Similarly *B. van Schaack*, *Darfur and the Rhetoric of Genocide*, *Whittier Law Review* 26 (2004-2005), 1128. In fact, the question whether “motive” forms part of the elements of the crime of genocide, has caused one of the “major controversies” in the debate of this crime; *G. E. Bisharat*, *Sanctions as Genocide*, *Symposium: International Sanctions Against Iraq: Where are we after Ten Years?*, *Transnat'l L. & Contemp. Probs.* 11 (fall 2001), 379, at 416. *Alonzo-Maizlish* states that there was “great debate” during the drafting of the Genocide Convention on the question whether a “motive element” should be included; *D. Alonzo-Maizlish* (note

*lus specialis* the drafters of the Genocide Convention do call for the exploration of reasons behind the objective genocidal acts, which go well beyond the simple volitional element that mirrors the *actus reus*. It is not enough that the perpetrator (for example) killed members of the group and wanted to do that; he must have possessed the intent to destroy the protected group, in whole or in part, as such. But if this is the case, then motives carry a certain significance. The existence of particular motives may demonstrate that the reason behind the *actus reus* was not the destruction of the group and that therefore the *dolus specialis* is negated; while the existence of other motives may not be harmful to a finding of specific genocidal intent.<sup>94</sup>

With regard to the latter alternative, the Appeals Chamber had occasion to note that the existence of personal motives,<sup>95</sup> economic benefits or political advantages<sup>96</sup> does not necessarily exclude the presence of genocidal intent.<sup>97</sup> The co-existence of these reasons is certainly in principle possible. The defense in the Case of *Ruzindana* for instance, who stood accused of genocide before the ICTR, had claimed that it was the “elimination of business competitors” that had influenced his actions. It would be difficult to argue that it should be impossible for a perpetrator to appoint the destruc-

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60), 1382, fn. 58. *Greenawalt* points out that the record of the Ad Hoc Committee of ECOSOC which considered the draft of the *Genocide Convention*, does not reveal any discussions on the meaning of “intent” or “motive”, A. K. A. *Greenawalt*, Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation, *Columbia Law Journal* 99 (1999), 2275. See also D. L. *Nersessian*, The Contours of Genocidal Intent: Troubling Jurisprudence from the International Criminal Tribunals, *Tex. Int'l L. J.* 37 (2002), 267. Some authors refer to genocidal intent as a “purpose” (A. A. *Haque*, Group Violence and Group Vengeance: Towards a Retributivist Theory of International Criminal Law, *Buffalo Criminal Law Review* 9 (2005-2006), 310, which adds to the approximation of “intent” and “motive”. For a detailed discussion of the reasons in favor and against an inclusion of motives in the consideration of elements of a crime (with reference to English criminal law), see J. *Herring*, *Criminal Law*, 2006, 213 et seq. and (with reference to American law), W. R. *LaFave*, *Criminal Law*, 2003, 256 et seq.

<sup>94</sup> See also *van Schaack* on the obscuring of “evidence for genocidal intent”, if alternative explanations for the behavior in question can be identified; B. *van Schaack* (note 93), 1128. See also A. K. A. *Greenawalt* (note 93), 2285 and D. L. *Nersessian* (note 60), 315 (on motives which can indeed be considered as evidence for genocidal intent). – It is interesting to note that the international criminal tribunals were able to accept the significance of motives in the context of the subjective element of the perpetrator relating to the policy element of crimes against humanity. There, it was found that the perpetrator must not have acted “for purely personal motives completely unrelated to the attack on the civilian population”. *Tadić* (Trial Chamber), paras. 658, 659.

<sup>95</sup> *Kayishema* (Appeals Chamber), para. 161.

<sup>96</sup> *Jelisić* (Appeals Chamber), para. 49. See also D. L. *Nersessian* (note 93), 268 (on acts motivated by “financial gain” and ideological motives) and D. L. *Nersessian* (note 60), 315.

<sup>97</sup> See also G. *Mettraux*, Current Developments, *International Criminal Law Review* 1 (2001), 279 and A. K. A. *Greenawalt* (note 93), 2288 (on “ideological or political motives”).

tion of a protected group as his goal while at the same time intending to gain economic benefits from this action.

However, there is reason to believe that every case will need to be examined on its individual merits. In the case of *Ruggiu* for instance, the Belgian journalist had at some stage drawn the attention of the Gikondo population to the fact that members of the Rwandan Patriotic Front (RPF) were in the area; a statement which resulted in the killing of many people, women and children among them.<sup>98</sup> It seems, however, that *Ruggiu* had acted to warn one person in particular – the editor-in-chief of RTLM, who lived in this area. In a case like this it is at least conceivable that personal concerns rather than the desire to destroy a protected group had formed the intent of the perpetrator; additional evidence would be required to reach an appropriate assessment of this instance.

Two situations in particular, in which assumed genocidal intent may have been joined by another consideration, have proven to be cumbersome for the international tribunals.

The first concerns the potential co-existence of considerations of military or security concerns and genocidal intent. The Case of *Ruggiu* may again serve as an illustration of the complexities of this situation. The language used in *Ruggiu's* broadcasts was frequently of a military nature: There was a move to encourage “civil defence”,<sup>99</sup> there were references to the “enemy”, the RPF and their allies.<sup>100</sup> It is significant that the Trial Chamber states that, as time went past, the exhortations to fight the RPF and their allies assumed the meaning of exhortations to kill Tutsis and oppositional Hutus.<sup>101</sup> The relationship between the perception of military advantages and the intent to destroy a protected group may therefore be very close. The situation is in so far similar to the assessment of a co-existence of economic or political benefits: it is not inconceivable that a perpetrator might desire the destruction of a group and see in this at the same time a military advantage.

It should, however, also be noted that there were cases in which the international tribunals were content to accord greater weight to the military intention and to even allow it to exclude genocidal intent. Thus, the Trial Chamber in *Brđjanin* agreed that the fact that the greater part of the detainees in camps had been of military age,

“could militate further against the conclusion that the existence of genocidal intent is the only reasonable inference that may be drawn from the evidence.

<sup>98</sup> *Ruggiu* (Trial Chamber), para. 44 (viii).

<sup>99</sup> *Ruggiu* (Trial Chamber), para. 44 (iv).

<sup>100</sup> *Ruggiu* (Trial Chamber), para. 44 (i).

<sup>101</sup> *Ruggiu* (Trial Chamber), para. 44 (iv).

There is an alternative explanation for the infliction of these acts on military-aged men, and that is that the goal was rather to eliminate any perceived threat to the implementation of the Strategic Plan in the ARK [Autonomous Region of Krajina] and beyond.”<sup>102</sup>

Whereas the Appeals Chamber in *Krstić* pointed out that the male Muslim prisoners who had been killed, had been killed on the basis of their identity only; the victims had included civilians, old and young men.<sup>103</sup> The evaluation of the co-existence of military and genocidal intent therefore becomes a question of case-by-case analysis. If it can be proven that the perpetrator directed his acts solely against those members of the protected group who posed a military threat, and left other parts of the group unharmed, the finding for a specific genocidal intent will be much more difficult to support.<sup>104</sup>

Perhaps the most complicated case of a co-existence of intentions is that of the ethnic cleanser. The international tribunals – in particular the ICTY – have struggled long to evaluate the phenomenon of ethnic cleansing in the context of genocide. The Appeals Chamber in *Krstić* adopted the view that the forcible transfer of Bosnian Muslims from Srebrenica eliminated “even the residual possibility that the Muslim community in the area could reconstitute itself”.<sup>105</sup> The Trial Chamber in *Brdjanin* spelled it out: “forcible displacement”, in its view, “could be an additional means to ensure the physical destruction”.<sup>106</sup> In the case of *Blagojević*, Trial Chamber I of the ICTY accepted that “intent to destroy” means the physical or biological destruction of the group, but it also found that physical or biological destruction was the likely outcome of a forcible transfer if the group could no longer reconstitute itself.<sup>107</sup>

Not everybody agrees with this assessment. The Trial Chamber in *Stakić* saw a clear difference between the “mere dissolution” of a group and physical destruction.<sup>108</sup> In this context, it went back to the *travaux préparatoires*

<sup>102</sup> *Brdjanin* (Trial Chamber), para. 979.

<sup>103</sup> *Krstić* (Appeals Chamber), para. 37.

<sup>104</sup> It should be noted that the assertion that the perpetrator acted to avert a military threat, causes further complications. One may ask if child soldiers and human shields may be embraced by the definition of a “military threat”. If that were the case, then the difference between “military considerations” and the intention to destroy a protected group may be considerably diminished.

<sup>105</sup> *Krstić* (Appeals Chamber), para. 31.

<sup>106</sup> *Brdjanin* (Trial Chamber), para. 976.

<sup>107</sup> ICTY (Trial Chamber), Case No. IT-02-60-T, *The Prosecutor v. Vidoje Blagojević and Dragan Jokić*, Judgment 17.1.2005, (*Blagojević*, Trial Chamber), para. 666.

<sup>108</sup> ICTY (Trial Chamber), Case No. IT-97-24-T, *The Prosecutor v. Milomir Stakić*, Judgment 31.7.2003, (*Stakić*, Trial Chamber), para. 519.

and pointed out that a proposal to include “measures intended to oblige members of a group to abandon their homes [...]” had been rejected by the drafters of the Genocide Convention.<sup>109</sup> In the 2007 *Genocide Application Case*, the ICJ was similarly critical and found that

“[n]either the intent, as a matter of policy, to render an area ‘ethnically homogeneous’, nor the operations that may be carried out to implement such policy, can as such be designated as genocide: the intent that characterizes genocide is ‘to destroy, in whole or in part’ a particular group, and deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of that group, nor is such destruction an automatic consequence of the displacement.”<sup>110</sup>

Nor could it be said that academic opinion unequivocally supports a view of genocidal intent which encompasses the intent of the ethnic cleanser. *Schabas* went so far as to say that “[Ethnic cleansing] is intended to displace a population, [genocide] to destroy it. The issue is one of intent and it is logically inconceivable that the two agendas coexist.”<sup>111</sup>

A coexistence of motives in this regard is not entirely “inconceivable”. If the perpetrator expels a protected group into a territory where certain death awaits its members – a desert for instance, or another region unfit for human existence – then it would appear entirely possible that genocidal intent and the intent of “ethnic cleansing” share a place in the mind of the author of the act.<sup>112</sup> One example was provided in the Prosecutor’s appeal against the decision of the ICC Pre-Trial Chamber not to include genocide in the arrest warrant against the Sudanese President *Bashir*. On this occasion, the Prosecutor pointed out that “the harshness of the terrain in Darfur, to which the victims were forcibly displaced”, had not been considered by the Pre-Trial Chamber.<sup>113</sup> In the majority of cases, however, the assessment of the Trial Chamber in *Stakić* appears more convincing. Including ethnic cleansing in the definition of “physical or biological destruction” puts a

<sup>109</sup> *Stakić* (Trial Chamber), para. 519.

<sup>110</sup> ICJ, *Genocide Application Case*, para. 190.

<sup>111</sup> This statement, which was made in *W. A. Schabas*, *Genocide in International Law: The Crime of Crimes*, 2000, 200, has become a *locus classicus* on this issue and was quoted in *Brdjanin* (Trial Chamber), fn. 2456. In the second edition of *Schabas’* work (2009), it appears on 234.

<sup>112</sup> The ICJ did accept that acts of ethnic cleansing “may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts”. ICJ, *Genocide Application Case*, para. 109.

<sup>113</sup> Prosecution’s Application for Leave to Appeal the “Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir”, ICC-02/05-01/09, 10.3.2009, para. 27.

considerable linguistic strain on the phrase in question. "Destruction" carries a distinct notion of permanence which does not inhabit the concept of "expulsion": the group still exists, and it cannot even be said with certainty that it will never again re-form on its accustomed territory.

## 2. Does Contradictory Evidence Exist at the Same Time?

If the apparent conflict between evidence in support of genocidal intent and evidence to the contrary cannot be resolved by the assumption of co-existence of the two strands of evidence, then a real situation of contradictory evidence may exist. This is, however, only the case if the two strands of evidence exist at the same time.

The principle of simultaneity (or contemporaneity), which is well known to major legal systems in the world<sup>114</sup> retains its validity in the realm of international criminal law. It is mandatory that the *mens rea* extends to the period in which the *actus reus* is performed. In other words, if a perpetrator kills a victim because he bore a personal grudge against him, and later develops a general desire to destroy the entire group to which the victim belongs, it would be inapposite to apply this desire to the act in question; it comes too late. On the other hand, if a perpetrator once intended to destroy a protected group in whole or in part, repents his views, and then kills a member of the group for personal reasons, his views before the performance of the *actus reus* will not matter; they no longer exist at the crucial time.

At first glance, such changes in the mindset of a suspected génocidaire might not seem a likely occurrence. But the "intent to destroy" which the Genocide Convention requires, need not be the same as a long-standing, unshakeable conviction. The commander of a concentration camp might have the intent to destroy the ethnic population of the camp and yet change his views very quickly after learning of an advancing military force whose objective is the liberation of the camp. His intent might be replaced by the opportunistic desire to show that he was also responsible for some positive acts towards the inmates of the camp.

<sup>114</sup> For a discussion of the principle of contemporaneity in various domestic jurisdictions see A. R. White, *The Identity and Time of the Actus Reus*, *Criminal Law Review* (1977), 148; G. Marston, *Note, Contemporaneity of Act and Intention in Crimes*, *L.Q.R.* 86 (1970), 208; G. R. Sullivan, *Cause and Contemporaneity of Actus Reus and Mens Rea*, *C.L.J.* 52 (1993), 487 et seq.; C. Roxin, *Strafrecht Allgemeiner Teil*. Bd. 1, *Grundlagen. Der Aufbau der Verbrechenstheorie*, 2006, 478 et seq.; A. Schönke/H. Schröder/P. Cramer, *Strafgesetzbuch. Kommentar*, 2006, 269, paras. 48-49; H.-H. Jescheck/T. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil*, 1996, 294.



The findings of both the Trial Chamber and the Appeals Chamber in relation to *François Karera's* "pacification meetings" indicates that the ICTR is (on occasion) careful to distinguish between different stages in the defendant's behavior. In reviewing the reasoning of the Trial Chamber, the Appeals Chamber stated:

"It is implicit from the Trial Judgement that the Trial Chamber considered the fact that the Appellant held these "so-called pacification meetings" was not irreconcilable with the fact that he participated in other meetings in Rushashi"<sup>115</sup>

and found that *Karera* had not made the case that attendance at the pacification meetings "is incompatible with evidence that he was involved in the killings in Rushashi and Nyamirambo".<sup>116</sup>

As far as specific intent is concerned, a clear division of this kind does, however, necessitate sufficiently precise evidence for the existing intent of the perpetrator at the time of the *actus reus*. This appears easy enough when the author of the act accompanied the material part of the crime with utterances which revealed his intention. But it is a fair assumption that in the majority of cases the best evidence that is available leads only to an approximation of the intent as it existed at the time of the act.

In *Jelisić's* Case for instance, it would be reasonable to see his boasts on the number of Muslim victims he had killed in the context of his most recent victims, even though the utterances were apparently made after the act.<sup>117</sup> But there are cases in which no such statements existed – neither a confession by the perpetrator before the tribunal, nor any other piece of evidence that could be convincingly linked to a particular act at a particular time. Instead, a number of evidential strains may exist, referring to roughly the same, more general, timeframe. In situations of this kind, the phenomenon of contradictory evidence may indeed emerge; and it is then of importance to accord a value to the various forms of evidence that an international criminal tribunal may accept.

#### IV. Towards an Assessment of Contradictory Evidence

The jurisdiction of the international criminal tribunals provides a certain guidance as to the elements of human behavior which can appropriately be

<sup>115</sup> *Karera* (Appeals Chamber), para. 284.

<sup>116</sup> *Karera* (Appeals Chamber), para. 286.

<sup>117</sup> *Jelisić* (Trial Chamber), para. 103.

considered in the determination of incriminating evidence.<sup>118</sup> The tribunals are less clear about the evaluation of exculpatory evidence – evidence that negates the existence of genocidal intent. However, the principles of international criminal law are quite clear on situations which, after all due care has been taken to assess the significance of different strands of evidence, still present an insoluble evidentiary conflict pertaining to the *mens rea* of the suspected perpetrator: if reasonable doubt attaches to the existence of his intent, it must be resolved in favor of the defendant.<sup>119</sup>

Among the elements of evidence accepted by the international tribunals, two seem to merit particular attention in this respect: the existence or otherwise of an action and the existence or otherwise of a statement by the alleged genocidal perpetrator.

The *ad hoc* tribunals have for a long time accepted that the acts of the defendant themselves allow an inference of his intent at the time of commission.<sup>120</sup> This position, however, may require qualification. If specific intent is indeed to be considered the “distinguishing characteristic” of genocide<sup>121</sup> and if it is this intent that distinguishes it from certain crimes against humanity (extermination, murder), it would appear strange and contradictory to assume genocidal intent exclusively from the existence of, e.g. killings. The view expressed by some Trial Chambers, that the “scale of the atrocities”<sup>122</sup> and the “manner of killing”<sup>123</sup> can allow an inference of genocidal intent is particularly unsatisfactory. Crimes against humanity can be com-

<sup>118</sup> For an overview of evidence accepted by the *ad hoc* tribunals in the case of genocide, see *G. E. Bisharat* (note 93), 414. See also *N. H. B. Jørgensen*, *The Definition of Genocide: Joining the Dots In the Light of Recent Practice*, *International Criminal Law Review* 1 (2001), 297 (with references to the *Report of the Commission of Experts on the Former Yugoslavia* and the 1985 *Whitaker Report*)

<sup>119</sup> See at note 20. See also *Jelisić* (Trial Chamber) para. 108 and *Kayishema* (Appeals Chamber), para. 148, “On the basis of such evidence, it found that it had been established beyond reasonable doubt that the requisite *mens rea* was present.”

<sup>120</sup> ICTR (Trial Chamber), Case No. ICTR-97-20-T, *The Prosecutor v. Laurent Semanza*, Judgment 15.5.2003, (*Semanza*, Trial Chamber), para. 313; earlier *Akayesu* (Trial Chamber), para. 523.

<sup>121</sup> See above at note 59 Also *Jelisić* (Trial Chamber), para. 66.

<sup>122</sup> “large number of victims”, ICTR (Trial Chamber), Case No. ICTR-99-46-T, *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, Samuel Imanishimwe*, Judgment 25.2.2004 (*Ntagerura et al.*, Trial Chamber), para. 689. See also *L. J. LeBlanc*, *The Intent to Destroy Groups in the Genocide Convention: The Proposed U.S. Understanding*, *AJIL* 78 (1984), 382; *D. L. Nersessian* (note 93), 266; *D. L. Nersessian* (note 60), 314 and *G. Verdirame*, *The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals*, *ICLQ* 49 (2000), 586. The “scale of the atrocities” was mentioned in *Jelisić* (Appeals Chamber), para. 47. For a critical assessment of these strands of evidence see *Jørgensen* (note 118), 298.

<sup>123</sup> The “manner in which the soldiers killed the refugees”, *Ntagerura et al.* (Trial Chamber), para. 689.

mitted in an equally cruel fashion, and are indeed, because of the requirement of a “widespread and systematic attack”,<sup>124</sup> likely to result in large scale atrocities.

That does not mean that the facts of a case are without any value at all for the determination of the specific intent; but an assessment of intent which relies on only one of the above mentioned elements can easily yield misleading results. The opinion of the *Akayesu* Trial Chamber, which favored a more contextual view, is more convincing in this regard.<sup>125</sup>

There is, however, one element on the material side of the crime which may carry greater weight in the assessment of genocidal intent than the others. On some occasions, the defendant had adopted a process of selection before proceeding with the genocidal act. Thus, *Semanza* at one stage “instructed soldiers to separate Hutu from Tutsi, who were then killed by gunfire and grenades”.<sup>126</sup> In the *Bagambiki* Case the Trial Chamber made reference to massacres committed on a football field; on the eve of the atrocities, soldiers had come to the field and had “asked the refugees whether they were all Tutsis”.

If a perpetrator separates members of a protected group from other persons, he certainly does engage in an act of discrimination. If he then proceeds to kill the members he had thus selected, he will, by this act, have created a strong assumption that his action had indeed been based on an intent to destroy, in whole or in part, a protected group as such.

It may be more difficult to decide whether the lack of a particular action – in those cases where the perpetrator had the opportunity to act – can be taken as evidence for a lack of genocidal intent.

This situation has not received uniform treatment by the Trial Chambers. In the *Krstić* Case for instance, the Appeals Chamber did not accept the possibility that the perpetrator could have done more to effect the destruction of the group, as an argument against the assumption of genocidal intent. “Ineffectiveness” did not militate against the existence of specific intent.<sup>127</sup> In the Case of *Stakić* on the other hand, the Trial Chamber adopted a more accepting approach towards exculpatory evidence of this kind. With regards to killings in the Prijedor area, the Chamber found:

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<sup>124</sup> Art. 7 ICC Statute.

<sup>125</sup> “The Chamber considers that it is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group”, *Akayesu* (Trial Chamber), para. 523.

<sup>126</sup> *Semanza* (Trial Chamber), para. 429.

<sup>127</sup> *Krstić* (Appeals Chamber), para. 32.

“Had the aim been to kill all Muslims, the structures were in place for this to be accomplished”<sup>128</sup>

and it pointed out that, while 23,000 people had passed through the Trnopolje Camp, the killings in Prijedor were limited to about 3,000 persons.<sup>129</sup>

In a similar vein, the Trial Chamber in *Brdjanin* pointed to the fact that the Bosnian Serbs in the Autonomous Region of Krajina had the logistical resources to displace “tens of thousands of Bosnian Muslims and Bosnian Croats, [...] resources which, had such been the intent, could have been employed in the destruction of all Bosnian Muslims and Bosnian Croats of the ARK”.<sup>130</sup>

Context is again of great importance if the accurate value of the omission of a fact is to be ascertained. The omission of the destruction of a group when the perpetrator had the means at his disposal to proceed, may serve as a *prima facie* negation of genocidal intent. However, the consideration of contextual factors may change the picture. Thus, the Appeals Chamber in *Krstić* pointed out that the international attention which the situation in Srebrenica had attracted, may well have prevented the perpetrators from adopting a more “efficient way” of implementing a genocidal plan.<sup>131</sup>

Of more importance for the determination of genocidal intent is probably the second piece of evidence which is frequently invoked by the international tribunals – the existence of utterances at the commission of the *actus reus* of genocide. The various statements by *Jelisić*, *Kayishema* and *Ruggiu* have been mentioned above.<sup>132</sup> In the Case of *Jelisić* in particular, it is difficult to dismiss – as the Trial Chamber did – the importance of his utterances for the assessment of genocidal intent; one may assume that there could hardly be clearer evidence of such an intent than the phrase that the perpetrator hated all members of the group and wanted to kill them all.<sup>133</sup>

The lack of utterances on the other hand, appears not to have been seen as greatly significant in the determination of genocidal intent.<sup>134</sup> A context-

<sup>128</sup> Emphasis added by the Trial Chamber. *Stakić* (Trial Chamber), para. 553.

<sup>129</sup> *Stakić* (Trial Chamber), para. 553.

<sup>130</sup> *Brdjanin* (Trial Chamber), para. 978.

<sup>131</sup> *Krstić* (Appeals Chamber), para. 32.

<sup>132</sup> See also *M. A. Lyons*, Hearing the Cry Without Answering the Call: Rape, Genocide and the Rwandan Tribunal, *Syracuse Journal of International Law and Commerce* 28 (2001), at 119.

<sup>133</sup> “Goran Jelisić remarked to one witness that he hated the Muslims and wanted to kill them all”, *Jelisić* (Trial Chamber), para. 102.

<sup>134</sup> “The Defence also argues that the record contains no statements by members of the VRS Main Staff indicating that the killing of the Bosnian Muslim men was motivated by

tual view may again yield different results – in situations, where a statement had been expected of, but was denied by, the defendant (such as the refusal to take an oath on a genocidal leader), the omission of utterances might allow an insight into his mind and may cast doubt on the existence of genocidal intent.

Apart from these two elements of evidence, the international tribunals have in the past considered the existence of a genocidal plan,<sup>135</sup> the existence of a pattern (a systematic targeting of members of a group),<sup>136</sup> and the repetition of particular acts<sup>137</sup> as relevant for the assessment of the defendant's intent. However, there is reason to approach these factors, like the scale of the atrocities mentioned above, with a measure of caution. The decisive factor has to be the personal involvement of the defendant. A consideration which focuses on a pattern, on repeated acts or on a plan that was agreed by other perpetrators, may also catch the opportunist murderer who exploits the existing context of genocidal acts to get rid of isolated personal enemies within the group, without ever making the group "as such" the target of his intention.

Finally, there are strands of evidence which have been dismissed by the international tribunals in the past. The Trial Chamber in *Jelisić* had, among other considerations, relied on the "disturbed personality", the "anti-social" and "narcissistic" elements of his character, which had led him to commit the crime.<sup>138</sup> The Appeals Chamber rejected this line of reasoning and referred to the fact that no defense of insanity had been employed by Counsel for *Jelisić*.<sup>139</sup>

It seems a preferable view. What must count in the assessment of criminal responsibility is whether the perpetrator is capable of forming intent. A disturbed personality may allow a finding that this ability did not exist and that therefore criminal responsibility cannot be assumed. But once the Trial Chamber is convinced that the perpetrator is capable of forming intent, the remaining disorders in his personality cannot serve to negate the finding of the requisite *mens rea*.

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genocidal intent to destroy the Bosnian Muslims of Srebrenica. The absence of such statements is not determinative.", *Krstić* (Appeals Chamber), para. 34.

<sup>135</sup> *Jelisić* (Appeals Chamber), para. 48.

<sup>136</sup> *Jelisić* (Appeals Chamber), para. 47, "a pattern of purposeful action", *Kayishema* (Trial Chamber), para. 93.

<sup>137</sup> *Jelisić* (Appeals Chamber), para. 47.

<sup>138</sup> *Jelisić* (Trial Chamber), para. 106.

<sup>139</sup> *Jelisić* (Appeals Chamber), para. 70.

The Appeals Chamber also rejected the argument that *Jelisić* had killed his victims at random,<sup>140</sup> and the Chamber concluded that a

“reasonable trier of fact could have discounted the few incidents where he showed mercy as aberrations in an otherwise relentless campaign against the protected group”.<sup>141</sup>

This, however, requires further qualification. In view of the great significance that the absence of genocidal acts can carry,<sup>142</sup> it seems particularly unsatisfactory that the Appeals Chamber would permit a “discounting” of such an important element of evidence.<sup>143</sup> The preferable question would be one about the underlying motive to which the “aberrations” seem to point.

The motive, it will be found, was, in the case of *Jelisić*, far from altruistic. Giving *laissez-passers* to a victim whom *Jelisić* had at first beaten and to another, who had been forced to engage in a game of Russian roulette, is hardly the ephemeral moment of kindness that seems to be suggested in the judgment of the Appeals Chamber. His motive seems more likely rooted in the fact that he had become master of life and death and in the enjoyment of an exercise of power, which was made possible only by the dehumanization of his victims. As such, his motive was entirely compatible with the specific intent required for the crime of genocide.

## V. Conclusion

From the above examination, it appears that the problem of specific intent and the impact of inconsistencies in the behavior of the perpetrator is a problem of evidence as much as of material law. Its particular difficulty lies in the proper evaluation of evidentiary elements which may point to other, possibly contradictory motives behind the *actus reus*. To simply disregard this evidence or to state that motives are “irrelevant”<sup>144</sup> is an unsatisfactory approach; more so, as (as the case of *Stakić* has shown) a particular motive (ethnic cleansing) may be held to deny the existence of genocidal intent.

<sup>140</sup> *Jelisić* (Appeals Chamber), para. 71. See, on a discussion of the Appeals Chamber’s judgment in the *Jelisić* Case, C. Fournet (note 60), 87. Also K. Kittichaisaree (note 68), 513.

<sup>141</sup> *Jelisić* (Appeals Chamber), para. 70.

<sup>142</sup> See at note 127.

<sup>143</sup> See, however, the interpretation of the Appeals Chamber’s judgment in *G. Mettraux* (note 97), 282.

<sup>144</sup> *Kayishema* (Appeals Chamber), para. 161, *Jelisić* (Appeals Chamber), para. 49. But see for a different approach (regarding crimes against humanity), *Tadić* (Trial Chamber), paras. 658, 659.

The preferable view is an approach which would allow a detailed examination of evidence both in support of and against the assumption of genocidal intent. In some cases, it will be found that evidence for a different reason behind the acts of the perpetrator (e.g. economic, political or military advantages) may in fact coexist with the specific intent required for genocide. In other cases (as in the majority of cases of ethnic cleansing), the motive thus established militates against a finding of specific genocidal intent.

Even if contradictory evidence has been found to exist, a strict application of the principle of simultaneity may help to resolve the difficulty. A motive which denies genocidal intent, but arises at a point in time different from that of the genocidal act, is irrelevant and cannot enter into the consideration of the *dolus specialis*.

There are finally factors which may aid in the determination of genocidal intent or of the existence of a different motive. The existence and omission of facts, the existence and omission of statements, a plan or a pattern, repetitive acts and the independence of the perpetrator's decision, have been mentioned above. The value of other factors, however – the “disturbed personality” of a perpetrator or the “randomness” of his actions, has not found favor with the Appeals Chamber.

The treatment of these issues by the judges of the international criminal tribunals, however, does not merely represent a conflict between a Trial Chamber and the Appeals Chamber, in which the latter would lay down clear guidelines for the future assessment of genocidal intent. The prevailing situation, as has been seen above, is marked by continued differences in the weighing of evidence by various benches of ICTY and ICTR. To a degree, these difficulties can be understood by an appreciation of the particular nature of genocidal intent: it is certainly one of the most complex issues with which the international criminal tribunals have been confronted, and one which has a way of escaping simplified solutions. But it is also true that the differences in the evaluation of inconsistent behavior arise from the absence of a coordinated approach in the Trial Chambers, which is in turn based on an almost holy fear to lay down any but the most general rules on the assessment of evidence by the trial judges.

It is then not surprising that the claims of “inconsistent behavior”, of “selective assistance” and of “motives other than genocidal intent” belong to the weapons of choice in the armory of the defense. The general principle of the freedom of assessment allows for the possibility that the Trial Chamber in the instant case may be just as generous as the Trial Chamber in *Jelisić* when it comes to the evaluation of (seemingly) contradictory evidence – and



that the Appeals Chamber will affirm the “margin of deference”<sup>145</sup> if the prosecution disagrees with the outcome. As long as freedom of assessment is valued higher than certainty of the law, this situation is not likely to change, and it will inevitably be at the root of comparable difficulties in genocide cases before the ICC.

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<sup>145</sup> See at note 54.

